Supreme Court, U.S.
FILED
991810 MAR 15 2000
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

MICHAEL R. MARTIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL R. MARTIN
Reg. No. 10911-026
Federal Prison Camp
P.O. Box 5000
Florence, Colorado 81226
Petitioner, Pro Se

56 pp

QUESTIONS PRESENTED

1. Whether a defendant may be prosecuted under 18 U.S.C. § 666 absent a federal interest in the alleged offense conduct.

2. Whether a defendant may be convicted of bribery under 18 U.S.C. § 666 without proof of a specific *quid pro quo*.

LIST OF PARTIES

The parties to the proceeding below were:

Michael R. Martin, Defendant-Appellant

United States of America, Plaintiff-Appellee

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 2

1. Factual Background 3

2. The District Court Proceedings 6

3. Petitioner's Appeal 7

4. The Seventh Circuit's Opinion 8

REASONS FOR GRANTING THE WRIT 9

I. There is a conflict among the Circuits regarding the level of a federal interest to be shown in certain alleged offense conduct to prosecute a defendant under 18 U.S.C. § 666 9

II. Despite this Court's construction of a similar bribery statute as requiring the Government to prove a *quid pro quo*, the Seventh Circuit upheld a conviction for bribery under 18 U.S.C. § 666 without such proof 18

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

McNally v. United States, 483 U.S. 350 (1987) 17

Salinas v. United States, 522 U.S. 52 (1997) 10

United States v. Agostino, 132 F.3d 1183 (7th Cir. 1997), *cert. denied*, 118 S.Ct. 1526 (1998) 18, 19, 22, 23

United States v. Bass, 404 U.S. 336 (1971) 10, 12

United States v. Brumley, 116 F.3d 728 (5th Cir. 1997) 7, 8, 15, 16, 17

United States v. Bush, 522 F.2d 641 (7th Cir. 1975) 16, 17, 18

United States v. C.I.T. Credit Corp., 344 U.S. 218 (1952) 12

United States v. Cochran, 109 F.3d 660 (10th Cir. 1997) 15

United States v. Dakota, 188 F.3d 663 (6th Cir. 1999) 10

United States v. Del Toro, 513 F.2d 656 (2d Cir. 1975) 13, 14

United States v. Foley, 73 F.3d 484 (2d Cir. 1996) 11

United States v. Hall, 116 F.3d 1253 (8th Cir. 1997) 26

United States v. Hinton, 683 F.2d 195 (7th Cir. 1982) 13, 14

United States v. Holzer, 816 F.2d 304 (7th Cir. 1987) 24

United States v. Jennings, 160 F.3d 1006 (4th Cir. 1998) 20, 21, 22

United States v. Keane, 522 F.2d 534 (7th Cir. 1975) .. 16, 17

TABLE OF AUTHORITIES – Continued

Page

United States v. LaHue, 998 F.Supp 1182 (D. Kan. 1998), *aff'd*, 170 F.3d 1026 (10th Cir. 1999).....11, 14

United States v. McCormack, 31 F.Supp.2d 176 (D. Mass. 1998) 10, 11, 12

United States v. Mosley, 659 F.2d 812 (7th Cir. 1981).....13, 14

United States v. Rabbit, 583 F.2d 1014 (8th Cir. 1978) ..7, 15

United States v. Santopietro, 166 F.3d 88 (2nd Cir. 1999)..... 11

United States v. Sun-Diamond Growers of California, 526 U.S. 398 (1999).....8, 19, 22, 23, 24

United States v. Zwick, 199 F.3d 672 (3rd Cir. 1999)..... 9, 10, 12, 13

STATUTES AND RULES

Title 18 United States Code, Section 201...9, 19, 20, 21, 22

Title 18 United States Code, Section 641..... 9

Title 18 United States Code, Section 666..... *passim*

Title 18 United States Code, Section 1341....2, 6, 8, 25, 26

Title 18 United States Code, Section 1346 .....15, 16

Title 18 United States Code, Section 3231 6

Title 28 United States Code, Section 1254 1

FED. R. EVID. 403..... 26

FED. R. EVID. 404(b) 26

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Senate Report No. 98-225, 369-370 (1984) *reprinted in* 1984 U.S.C.C.A.N. 3182 .....13, 20

Charles B. Klein, *What Exactly is an Unlawful Gratuity After United States v. Sun-Diamond Growers?*, 68 Geo.Wash.L.Rev. 116 (1999) 20

PETITION FOR A WRIT OF CERTIORARI

TO THIS HONORABLE COURT:

The Petitioner, Michael R. Martin, respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on November 1, 1999.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 195 F.3d 961 (7th Cir. 1999) and is reproduced at Pet. App. A, *infra*, 1a-14a. The order of the Seventh Circuit for remand on restitution is reproduced at Pet. App. B, *infra* 1b. The order of the Seventh Circuit denying rehearing is reported and is reproduced at Pet. App. C, *infra* 1c.

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit was issued on November 1, 1999. A timely petition for rehearing and suggestion for rehearing en banc was denied by the Court of Appeals on December 16, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The Statutory provision at issue, 18 U.S.C. § 666(a)(2), provides, in relevant part:

> (a) Whoever, if the circumstance described in subsection (b) of this section exists . . .
>
> > (2) corruptly gives, offers, or agrees to give anything of value, to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;
>
> shall be fined under this title, imprisoned not more than 10 years, or both.

STATEMENT OF THE CASE

Michael R. Martin was indicted for 16 counts of mail fraud pursuant to 18 U.S.C. § 1341 and one count of bribery pursuant to 18 U.S.C. § 666 arising out of a contract with the Illinois Department of Public Aid.

After trial by jury the Appellant was convicted on all counts and under the Federal Sentencing Guidelines was sentenced to 70 months incarceration with $12,306,000 as restitution. A timely notice of appeal was filed.

1. Factual Background

In 1990, Michael Martin and William Ladd purchased Management Services of Illinois, Inc. ("MSI"), and by doing so, inherited a single "body shop" data processing contract with the State of Illinois. 8/4/97, Tr. 18. MSI did not automatically receive a renewal of the contract for health insurance identification held by its predecessor company, but submitted a proposal in 1990 to the Illinois Department of Public Aid ("IDPA") which was accepted. 8/4/97, Tr. 19-20.

Pursuant to an August 1990 contract for third-party liability insurance identification with IDPA, if the State of Illinois had paid a health care claim and that money was recouped, MSI received 19% of monies recovered. 8/4/97, Tr. 20. Through MSI's computer software and employees, MSI identified third-party liability insurance for the IDPA recipients and collected substantial sums of money for the State of Illinois. In September of 1991, a three-year contract at the same payment rate was signed by then-IDPA Director, Phil Bradley, and MSI similar to an earlier contract.

Because there was a backlog of 10,000 forms from other sources containing insurance information which needed to be entered into the IDPA computer system and the IDPA employees were unable to process the responses in a timely manner, MSI took over another third-party liability project called the Labor Match. Tr. 647, 652. This additional work was discussed and approved by the then-IDPA Director, Phil Bradley.

MSI became so successful at identifying third-party liability insurance that its efforts became contrary to its

own interests because MSI was only paid a percentage of *recovered* money. 8/4/97, Tr. 61-2. Under the contract, after being identified by MSI, the bills would be sent directly to the identified insurer by the provider or forwarded to the insurer upon receipt by the State of Illinois. 8/4/97, Tr. 62-3. Thus, the sooner MSI identified a third-party insurer, the less likely there would be any claim paid out by the State of Illinois on behalf of that IDPA recipient. Ultimately, MSI decided to re-negotiate the contract so that it would be paid for both monies recovered and for costs avoided by the State of Illinois through MSI's identification of third-party liability insurers. 8/4/97, Tr. 63-5.

In late 1993, Martin approached the State of Illinois with a proposition that the contract be amended. MSI submitted an amended contract proposal under which MSI would be paid a flat fee for each insurance company identification it made. For example, if MSI found that John Doe had private insurance and notified the State of Illinois of the fact, MSI would be paid the same flat fee for that information regardless of whether John Doe ever got sick and made a claim to the State of Illinois. On the other hand, MSI would receive the same flat fee if John Doe had costly open-heart surgery and submitted a bill to the State of Illinois for hundreds of thousands of dollars. 6/27/97, Tr. 422-3. Ostensibly, both the State of Illinois and MSI would benefit under this arrangement. Martin's proposal was not countered by a lower figure, but accepted by the Governor's Office and relayed to the IDPA. 7/11/97, Tr. 225.

An amendment to the original contract was entered into in December of 1993 whereby MSI would receive

$350 for every insurance identification, regardless of whether claims were made, with the terms of the contract effective from July 1, 1991 through June 30, 1996. No evidence was presented at trial that MSI's work was not performed; to the contrary, the evidence showed that MSI actually did all of the work for which it billed. Additionally, the evidence showed that MSI was highly competent and accurate, with an accuracy rating of approximately 95%. Tr. 874, 893. MSI's work identifying other insurance sources allowed the State of Illinois to reject and refer to the proper insurance company actual IDPA claims in excess of $60 million in less than a three-year period. 7/30/97, Tr. 35. Evidence presented at trial estimated that MSI saved the State of Illinois over $300 million in medical payments which were never presented to the State of Illinois but went directly from the health care provider to a third-party liability insurance company. 7/30/97, Tr. 36-7.

No one directly involved in re-negotiating the contract was paid any money or given any gifts or benefits to obtain the 1993 contract amendment. The only gift given to anyone involved in the re-negotiation process by MSI was a Christmas box of steak and lobsters to James Berger, the Deputy Director of the IDPA. The contract amendment was approved by then-Director, Robert Wright, who never received any gifts from MSI and was never charged with any wrongdoing.

Fleming and Lowder, Martin's longtime close friends, were employed at the IDPA in supervisory capacities. The evidence was uncontradicted at trial that neither of them had any involvement in the re-negotiation of the contract other than preparing cost projection figures as requested

by their supervisors. The actual contract terms were renegotiated by their supervisors. Evidence at the trial showed that at no time was MSI or Martin paid with federal dollars nor did MSI or Martin have any authority over or administrative responsibilities concerning federal monies. 7/9/97, Tr. 25, 35, 46.

2. The District Court Proceedings

On October 24, 1996, the Petitioner and MSI were charged by superceding indictment with 16 counts of mail fraud under 18 U.S.C. § 1341. Three other individuals were charged in the superceding indictment as well. The Petitioner and MSI were also charged with one count of bribery regarding federally funded programs under 18 U.S.C. § 666(a)(2). The district court exercised jurisdiction over the case pursuant to 18 U.S.C. § 3231.

The Government's case, focusing primarily on the single count of bribery found in Count 17 of the superseding indictment, intended to show evidence that the Petitioner, through gifts and promises of future employment, sought to illegally influence the decisions of officials of the State of Illinois in MSI's securing of an amended contract.

The Government also presented substantial evidence and testimony relating to large campaign contributions made by Petitioner to prominent Republicans in Illinois including the then-Governor, James Edgar. However, Petitioner was not charged with any violations of any laws regarding these campaign contributions.

Following a jury trial, Petitioner, MSI and a co-defendant were convicted of Counts 1-19 of the superceding indictment. One defendant was acquitted.

3. Petitioner's Appeal

In his appeal to the United States Court of Appeals for the Seventh Circuit, the Petitioner argued, *inter alia*, that Petitioner had no corrupt intent, an element that is required for bribery to exist. Petitioner also argued, regarding the amount of intrusion by the federal government into a matter of contractual relations by and between a sovereign state and one of its vendors, that the federal government had overstepped the permissible limits of jurisdiction of the mail fraud statute by using the theory of intangible rights to convict him in the absence of a violation grounded in state law, citing *United States v. Brumley*, 116 F.3d 728, 735 (5th Cir. 1997). Petitioner cited *United States v. Rabbitt*, 583 F.2d 1014, 1026 (8th Cir. 1978) in which the Eighth Circuit reversed a mail fraud conviction, expressing its concern over the federal encroachment upon state government and private industry should the conviction be allowed to stand. Appellant's Appeal Brief at 27, *United States v. Martin*, 195 F.3d 961 (7th Cir. 1999) (Nos. 98-2621, 98-2967).

In response to the Petitioner's arguments on appeal, the Government focused upon the sufficiency of the evidence analysis that is standard in many appellees' briefs. However, the Government did not provide any further discussion of the issues raised by Petitioner regarding the federal government's intrusion into state issues.

In the Reply Brief, Petitioner additionally argued that the bribery conviction could not stand because of the Supreme Court's decision in *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999) which was decided after the filing of Petitioner's Appeal Brief. In *Sun-Diamond*, under a similar bribery statute, this Court held that the government must show a *quid pro quo* and, absent that specific requirement in the jury instructions, the conviction must be reversed. In the instant case, no such showing of a *quid pro quo* was made to support the bribery conviction. Furthermore, as applied to the instant case, because the only violation of law to support the mail fraud convictions was the bribery conviction, Petitioner argued that the mail fraud convictions must also be overturned.

4. The Seventh Circuit's Opinion

The Seventh Circuit's opinion in response to Petitioner's appeal was notable in the fact that it almost entirely failed to review Martin's convictions and arguments, focusing on Lowder's. In its opinion affirming Petitioner's convictions under the § 666 bribery count and the § 1341 mail fraud counts, the Seventh Circuit gave only cursory treatment to the Petitioner's argument which stated that any breaches of a fiduciary duty giving rise to federal mail fraud must be grounded in state law. In support of the argument, Petitioner cited *United States v. Brumley*, 116 F.3d 728 (5th Cir. 1997) (en banc). The Seventh Circuit acknowledged a split in the Circuits on this issue but declined to address it on the appeal. Instead, the Seventh Circuit considered Petitioner's arguments on this issue waived and stated that the court

would address this issue in a future case. The Seventh Circuit's opinion also failed to address the Petitioner's arguments raised in the Reply Brief regarding the necessity of a *quid pro quo* to sustain a bribery conviction.

REASONS FOR GRANTING THE WRIT

I.

THERE IS A CONFLICT AMONG THE CIRCUITS REGARDING THE LEVEL OF A FEDERAL INTEREST TO BE SHOWN IN CERTAIN ALLEGED OFFENSE CONDUCT TO PROSECUTE A DEFENDANT UNDER 18 U.S.C. § 666

A. Nexus Should Be Required Between Federal Funds and Offense Conduct

In 1984, Congress enacted 18 U.S.C. § 666, concerning theft or bribery in relation to programs receiving federal funds. Prior to the enactment of § 666, the federal bribery statutes were found at 18 U.S.C. § 201 and § 641 and these statutes had a somewhat limited scope that did not clearly reach bribery involving state and local government officials. At first glance, § 666 appears to fill in the voids left by § 201 and § 641 and one court noted that "[b]y its terms, § 666 fills these particular voids [in § 201 and § 641]: it imposes no title or tracing requirements and covers non-federal employees." *United States v. Zwick*, 199 F.3d 672, 679 (3rd Cir. 1999). That court continues by stating "[t]he government only must prove the basic elements of the § 666 offense." *Id.*

Notwithstanding the apparent broad scope and reach of § 666, the law is unsettled as to what is required to sustain a conviction under this statute. This Court has specifically left open the question that Petitioner Martin brings forth in this Petition for Writ, namely, to what extent, § 666 "requires some other kind of connection between a bribe and the expenditure of federal funds." *Salinas v. United States*, 522 U.S. 52, 59 (1997).

Circuit Courts remain split on "the question of whether § 666 requires that a federal interest be implicated by the offense conduct." *Zwick*, 199 F.3d at 687. The Sixth Circuit has found that "the nature of any necessary connection is left unanswered." *United States v. Dakota*, 188 F.3d 663, 668 (6th Cir. 1999). The Sixth Circuit in *Dakota* held that § 666 does not require proof of a connection between the offense conduct and federal funds or programming. *Id.* This interpretation has been criticized for requiring no connection between the offense conduct and federal funds or programming as it would criminalize a host of corrupt acts committed by State agents, among others, by virtue of the fact that all states receive at least $10,000 in federal funds per year. See *United States v. McCormack*, 31 F.Supp.2d 176, 186 (D.Mass 1998). This result raises significant federalism concerns turning traditionally local conduct into a matter of federal enforcement involving a substantial extension of federal enforcement resources. See *United States v. Bass*, 404 U.S. 336, 350 (1971). Expressing concern about the adoption of the government's interpretation of § 666, the *McCormack* court indicated that the Sixth Circuit should not transform § 666 into a general federal anti-corruption statute

when Congress has not clearly expressed its intention to do so. See *McCormack*, 31 F.Supp.2d at 186.

Other circuits, including the Second, have concluded that some federal connection is required between the offense conduct and federal funds. *United States v. Santopietro*, 166 F.3d 88, 93 (2nd Cir. 1999). The Second Circuit in *Santopietro* upheld and followed its previous decisions including *United States v. Foley*, 73 F.3d 484, 488-493 (2nd Cir. 1996). In *Foley*, the court properly reversed the convictions after the government did not prove that the corruption in some way touched federal funds. The Tenth Circuit rejected the government's interpretation of § 666 finding that it would include any organization that is assigned $10,000 in funds initially disbursed under a federal program source. *United States v. LaHue*, 998 F.Supp. 1182 (D. Kan. 1998), *aff'd*, 170 F.3d 1026, 1029 (10th Cir. 1999). Under the government's view, if a recipient doctor endorsed a Medicare check to pay a supplier of medical goods, the supplier would be receiving benefits from a federal program. The court held that "this construction creates almost a limitless statutory reach beyond a plain commonsense interpretation of the statute." *Id.* at 1029. The court opined that "the implausibility that Congress intended this limitless result in a criminal statute creates an ambiguity regarding the meaning of just who 'receives . . . benefits . . . under a Federal Program' within the meaning of § 666(b)." *Id.* at 1030.

Indeed, the very constitutionality of a portion of § 666 has been questioned in the federal courts. In *McCormack*, the court acknowledged that *Salinas* expressly left open the possibility that § 666(a)(1)(b) is unconstitutional as applied to cases that lack some connection between the

corrupt activity and federal funds or programming. With regard to the intent (drawn from legislative history) of § 666 to protect the integrity of federal funds from corruption, District Judge Gertner stated " . . . I find that 'integrity' must be more carefully construed to find some nexus with the federal funds or programs . . . Establishing such a requirement is consistent with limits the Supreme Court has placed on the spending power." *McCormack*, 31 F.Supp.2d at 189. The court found it unconstitutional to convict the defendant without such a nexus. *Id.*

The *Zwick* court looked at the legislative history of the statute before holding "§ 666 requires that the government prove a federal interest is implicated by the defendant's offense conduct." *Zwick*, 199 F.3d at 687. In so doing, the Third Circuit was seeking to interpret the scope of § 666. The Supreme Court has cautioned Circuit Courts against interpreting a statute in a manner that significantly alters the federal-state balance unless Congress has clearly indicated that it intended to do so. *Id.* at 686. The *Zwick* court also cited the direction of the Supreme Court in *Bass*, as further justification for its interpretation. The *Bass* court stated:

> In various ways over the years, we have stated that 'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.'

United States v. Bass, 404 U.S. at 347 (quoting *United States v. C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952)).

In Senate Report No. 98-225, the legislative history of § 666 noted three cases in which the corrupt transaction clearly implicated federal interests. S. Rep. No. 98-225, at 369-370 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3511. In *United States v. Del Toro*, the federal government paid one hundred percent of the cost of the program in question and eighty percent of the salaries, including the salary of the person allegedly bribed. *United States v. Del Toro*, 513 F.2d 656 at 658, 651 (2nd Cir. 1975). In *United States v. Hinton*, the defendants were contracted to administer a program for the City of Peoria funded by HUD. The defendants had discretion in administering the federal funds and the federal funds paid the defendants' salaries and the entire cost of the program they administered. *United States v. Hinton*, 683 F.2d 195, 196-199 (7th Cir. 1982). In *United States v. Mosley*, the program administered by the defendant was funded by the federal government, the defendant exercised discretion in the administration of the federal funds and the bribery related to the defendant's administration of the program. *United States v. Mosley*, 659 F.2d 812, 816 (7th Cir. 1981).

The *Zwick* court determined that "nothing in the legislative history suggests that Congress intended to go well beyond the examples in *Del Toro*, *Hinton* and *Mosley* to make § 666 applicable when no federal interest is implicated by certain offense conduct." *Zwick*, 199 F.3d at 686.

The Tenth Circuit, while reviewing the legislative history of § 666, noted that lawmakers also intended to limit the statute's reach to its underlying purpose of "protect[ing] the integrity of the vast sums of money distributed through federal programs from theft, fraud,

and undue influence by bribery." See *LaHue*, 170 F.3d at 1030. Elaborating on the statute's intended purpose, the court indicates the statute was designed to prevent the diversion of federal program funds on the distribution path to its intended beneficiaries.

In this regard, at no time did Petitioner Martin or MSI in fulfilling its contractual obligations to the State of Illinois ever interfere with or divert federal funds from their intended beneficiaries and, thus, never provided a basis for federal jurisdiction under § 666. As shown in the Factual Background herein, Petitioner Martin contracted with a program funded and administered by the State of Illinois and no federal funds were implicated by his offense conduct. 7/9/97, Tr. 25, 35, 46. Petitioner did not contract with an agency, which had 100% of the cost of its third-party liability program paid for by the federal government as in *Del Toro*. Petitioner had no discretion, nor did his co-defendants, over the administration of federal funds as in *Hinton* and *Mosley*. Clearly, the Petitioner offense conduct had no connection whatsoever to the administration or spending of any federal funds. What Petitioner is requesting of this Court is that it provide direction to the various Circuits on the issue presented herein.

B. Intangible Rights Doctrine Encroaches Upon Conduct Properly Under the Purview of State Government

Martin argued in Petitioner's Appeal Brief and Reply Brief that the federal government had overstepped the permissible limits of the mail fraud statute by using the

theory of intangible rights fraud to convict him in the absence of a violation of state law, citing *United States v. Brumley*, 116 F.3d 728, 735 (5th Cir. 1997). Petitioner cited *United States v. Rabbitt*, 583 F.2d 1014, 1026 (8th Cir. 1978) in which the Eighth Circuit reversed a mail fraud conviction, arguing that the "inroads into not only state government but private industry will be enormous and without limit" should such conviction be allowed to stand. Appellant's Appeal Brief at 27, *United States v. Martin*, 195 F.3d 961 (7th Cir. 1999) (Nos. 98-2621, 98-2967).

The *Brumley* court suggests that the creation of federal common law crimes without underlying state laws delineating breaches is troubling when it states: "[I]t would give us great pause if a right to honest services is violated by every breach of contract or every misstatement made in the course of dealing." *Brumley*, 116 F.3d at 735 quoting *United States v. Cochran*, 109 F.3d 660, 667 (10th Cir. 1997). While this statement suggests that the *Brumley* court was relieved that a criminal state statute existed in that case, the court appears to express grave concerns about a case where a mail fraud conviction would be permitted to stand where no such state criminal law exists. These fears are based upon "the tension inherent in federal criminalization of conduct by state officials innocent under State law" which the court recognizes as dangerous. *Id.*

The Dissent in *Brumley* goes even further when it questions the Majority Opinion's broad construction of § 1346. The Dissent does not reach the question of whether § 1346 requires a violation of an underlying state law as it finds the Majority's interpretation of § 1346 to be overbroad and the terms of § 1346 not to implicate the

conduct at issue. The Dissent, in its analysis of the statutory construction and legislative intent, finds the "statute fails on its face to make a crime of the charged conduct". *Brumley*, 116 F.3d at 736. Furthermore, it finds the legislative history makes "plain beyond any doubt that § 1346 cannot be fairly construed to reflect a clear congressional intent to police the integrity of state officers" and proceeds to note the "patent and indisputable ambiguity crippling" the *Brumley* prosecution. *Id.* The Dissent further states its incomprehension "that the majority can conclude [the language of § 1346] reflects a clear statement of a congressional intention to protect the citizenry of a state from corrupt state officials" and further analyzes the legislative history and the fact the "House of Representatives was unwilling to pass a criminal statute to reach the conduct alleged in the instant indictment." *Id.* at 742 (referring to Section 2 of S.2793 of the 100th Congress which explicitly criminalized certain actions by state officials). The Dissent finds that neither § 1346 nor its legislative history indicate congressional intent to delegate to the courts the task of defining honest services, even if such a delegation were constitutional. *Id.* at 746. Moreover, the Dissent cautions such a scheme cannot satisfy the fair notice requirement applicable when drawing the line between permitted and prohibited conduct. *Id.*

In holding that Martin had waived the argument as to the scope of the mail fraud statute, the Seventh Circuit stated that *Brumley* was contrary to the law in the Seventh Circuit, citing *United States v. Keane*, 522 F.2d 534, 544-45 (7th Cir. 1975) and *United States v. Bush*, 522 F.2d 641, 646 n.6 (7th Cir. 1975) and thus, Martin was required to

distinguish the instant case from those two cases. However, both *Bush* and *Keane* were abrogated by the Supreme Court's decision in *McNally v. United States*, 483 U.S. 350 (1987) and the Seventh Circuit has not yet revisited the issue.

The Dissenting Opinion in *Brumley* recounts the opinion in *McNally*, which, in part, prompted the passage of § 1346 when it overturned a conviction under the intangible rights doctrine under which the federal government was believed to be setting standards of disclosure and good government for local and state officials. *Id.* at 738. The *Brumley* court notes that *McNally* overruled the theories upon which a large number of Circuit Court decisions were based including those addressing: 1) state and federal officials convicted of defrauding citizens of their right to honest services of their governmental officials; 2) elected officials and campaign workers convicted of mail fraud for using the mail to falsify votes; 3) private sector agents with a clear fiduciary duty to employers or union found guilty of defrauding by accepting kickbacks or selling confidential information; and 4) private sector defendants convicted for defrauding individuals of their rights to privacy and other non-monetary rights. *Id.* These pre-*McNally* decisions that were overturned encompass circumstances such as those at issue in *Bush* and *Keane*.

It is an open question of law in the Seventh Circuit as to whether a violation of state law is required to sustain a conviction under the mail fraud statute. Nevertheless, *Bush* supports Petitioner's position that it requires some or all of the following factors in order to support a mail fraud conviction: a duty to disclose an interest with a

concomitant failure to do so (Martin had no such duty); an attempt to cover up through false pretenses (there was none); a taking of money or property or rights of another through bribery or other means (Martin did not bribe Lowder, and his conviction cannot stand as detailed); or a violation of some state or federal statute (none is present in this case). *Bush*, 522 F.2d at 645.

II.

DESPITE THIS COURT'S CONSTRUCTION OF A SIMILAR BRIBERY STATUTE AS REQUIRING THE GOVERNMENT TO PROVE A *QUID PRO QUO*, THE SEVENTH CIRCUIT UPHELD A CONVICTION FOR BRIBERY UNDER 18 U.S.C. § 666 WITHOUT SUCH PROOF

A. *Quid Pro Quo* Is A Required Element of Bribery

The Government argued before the Seventh Circuit that there was sufficient evidence to sustain Martin's conviction under 18 U.S.C. § 666(a)(2) for corruptly offering bribes in connection with federally funded agencies because a rational jury could find that benefits were given and received with the intent to influence and reward Lowder's and Fleming's official actions. The Government acknowledges that no *quid pro quo* is present in the instant case and cited *United States v. Agostino*, 132 F.3d 1183, 1190 (7th Cir. 1997), *cert. denied*, 118 S.Ct. 1526 (1998), for the proposition that a *quid pro quo* is not an element needed for conviction. Consolidated Brief of Plaintiff-Appellee at 42, *United States v. Martin*, 195 F.3d 961 (7th Cir. 1999) (Nos. 98-2621, 98-2967).

The Government's argument is flawed in that a conviction for bribery requires a *quid pro quo*. The holding in *Agostino* is no longer the law in light of a recent decision by the United States Supreme Court which was decided after Defendant-Appellant Martin's Appeal Brief was filed and which the Seventh Circuit failed to meaningfully address.

In *United States v. Sun-Diamond Growers of California*, a gratuity case, the court recognized that a conviction for bribery pursuant to 18 U.S.C. § 201(b)(1) requires a *quid pro quo*, in other words, a specific intent to give or receive something of value *in exchange* for an official act. 526 U.S. 398, 404 (1999). The key to a finding of a *quid pro quo* is in the relationship of a gift or gratuity to a specific act.

Although the *Sun-Diamond* case did not specifically address 18 U.S.C. § 666, the two statutes should be construed the same. Section 201(b)(1)(a), discussed in the *Sun-Diamond* case, prohibits the giving of anything of value to a public official with the *corrupt intent* [emphasis added] to influence his official acts. Similarly, § 666(a)(2) prohibits the giving of anything worth more than $5,000 with the *corrupt intent* [emphasis added] to influence or reward an agent of a state agency, which receives federal funds. The common purpose behind the two provisions is demonstrated by their substantially identical language and the common result to punish one who corruptly gives something of value with the intent to influence official acts to either a federal official or the agent of a state agency that receives federal funds. The legislative history of § 666 indicates that "Congress supplemented § 201 to make clear that federal law prohibits 'significant acts of . . . bribery involving Federal monies that are

disbursed to private organizations or State and local governments pursuant to a Federal program.' " *United States v. Jennings*, 160 F.3d 1006, 1013 (4th Cir. 1998) (quoting 1984 U.S.C.C.A.N. 3182, 3510).

The appropriateness of construing § 666 the same as § 201 is also demonstrated in *Jennings* which looked to § 201 for guidance in interpreting § 666 and found bribery under § 666 to require a *quid pro quo*. *Jennings*, 160 F.3d at 1013; Charles B. Klein, *What Exactly is an Unlawful Gratuity After United States v. Sun-Diamond Growers?*, 68 Geo.Wash.L.Rev. 116, 128 (1999). In *Jennings*, the court construed the bribery requirements under § 666 identically to the bribery requirements under § 201 which require proof of a *quid pro quo*. The court stated "the payor of a bribe must intend to engage in 'some more or less specific *quid pro quo*' with the official who receives the payment." *Jennings*, 160 F.3d at 1013. The court makes multiple references to this requirement and summarizes that the "*quid pro quo* requirement is satisfied so long as the evidence shows a 'course of conduct of favors and gifts flowing to a public official *in exchange for* a pattern of official actions favorable to the donor." *Id.* at 1014. Furthermore, the court explains that

> [o]n our assumption that § 666 makes the same bribe/gratuity distinction as § 201, a court instructing a jury on § 666(a)(2) must define the 'corrupt intent' element in the same way it would in instructing on § 201(b). Thus (we assume) a court must instruct the jury that it may convict a defendant for violating § 666(a)(2) only if it finds that the defendant intended to exchange a payment for some specific official act or course of action. Further, because a court

> instructing on § 201(b) must explain the lesser-included offense of illegal gratuity whenever there is some evidence supporting a gratuity theory, it follows (under our assumption) that a court instructing on § 666(a)(2) must explain, if requested, the defense of 'mere gratuity' when there is evidence to support a gratuity theory.

Id. at 1019.

Thus the court in *Jennings* agreed with the defendant that the district court plainly erred by giving an instruction on the corrupt intent element of bribery when it left out the requirement of an intent to engage in a *quid pro quo*. *Id.* at 1020. While the court ultimately upheld the conviction of the defendant, that result occurred because it found "Jennings intended to engage in a *quid pro quo*" and thus, the elements of bribery were demonstrated at trial. *Id.* at 1015.

The *Jennings* court criticized the Second Circuit and the Seventh Circuit finding they have blurred "the long standing distinction between bribes and illegal gratuities" by allowing § 666(a)(2) convictions to stand without proof that the defendant intended to engage in a *quid pro quo*. *Id.* at 1015 n.4. Additionally, the court states that

> [a] close reading of these cases reveals, however, that there is still room for an argument that § 666 does not prohibit gratuities. This argument is that § 666 accepts the longstanding bribe/gratuity distinction, adopts the traditional meaning of 'corrupt intent' in § 201 [the statute upon which § 666 is based], and criminalizes only bribes.

Id.

The *Jennings* court specifically questions the Seventh Circuit decision in *United States v. Agostino,* 132 F.3d 1183 (7th Cir. 1997), *cert. denied,* 118 S.Ct. 1526 (1998) which upheld a conviction under § 666(a)(2) without any allegation of a specific *quid pro quo,* stating that the court did not "acknowledge that under § 201 courts equate 'corrupt intent' with the intent to engage in a relatively specific *quid pro quo.*" *Id.* The court further states "[i]n fact, the court did not mention § 201, so we cannot know whether it considered the customary distinction between bribes and illegal gratuities. *Agostino's* persuasive weight is therefore subject to debate." *Id.*

The facts in *Jennings* differed substantially from the instant case. In that case, the defendant claimed he had paid no money to a public official despite evidence of repeated cash payments close in time to the defendant's receipt of payments for work under a contract, with evidence of comments made linking the cash payments to the contract payments. The *Jennings* court leaves open the question of whether § 666 prohibits gratuities because the court found the evidence was sufficient to convict the defendant of bribery. In the instant case, the defendant was similarly convicted of bribery under § 666 without an appropriate jury instruction upon the requirement for a *quid pro quo* yet under factual circumstances that do not demonstrate any *quid pro quo* ever occurred.

Based upon the foregoing, the logic of the holding requiring proof of a *quid pro quo* in *Sun-Diamond* under § 201, applies equally to conduct alleged under § 666(a)(2). *Sun-Diamond* clearly demonstrates that the intent to influence or reward must be proven through evidence of a *quid pro quo* and no such evidence can be

found in the record in this case. In *Sun-Diamond*, the Secretary of Agriculture, Mike Espy, was given sports tickets, meals, luggage, and a couple of small gifts by a trade association directly affected by his official decisions in at least two matters. *Sun-Diamond*, 526 U.S. at 401. The court recognized that bribery is considered a far more serious crime than an illegal gratuity. Even in the less serious context of a gratuity case, however, the court rejected the government's argument that the statute "reaches any effort to buy favor or generalized goodwill from an official who either has been, is, or may at some unknown, unspecified later time, be in a position to act favorably to the giver's interests." *Id.* at 405. Moreover, Justice Scalia, writing for the unanimous court in *Sun-Diamond*, stated that "a statute in this field (bribery) that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter." *Id.* at 412. Thus, *Sun-Diamond* clarifies that in the instant case, Martin's gifts to his two closest friends, Lowder and Fleming, of sports tickets, meals, loans, and the like did not constitute bribery without a *quid pro quo*.

As noted earlier, the court acknowledged that no *quid pro quo* was demonstrated in the instant case. Appellee's Brief at 42, *Martin* (Nos. 98-2621, 98-2967). The jury instructions did not require a finding of a *quid pro quo* in order to convict Martin for bribery.[1] The instructions required in relevant part "that the thing of value was

---

[1] As explained by the Petitioner in his Reply Brief, no objection was made to the jury instructions at trial because at that time counsel had no basis in light of the Seventh Circuit's holding in *Agostino, supra*.

given with the intent to influence or to reward Ronald Lowder or Curtis Fleming, employees of the IDPA, in connection with the business of the IDPA valued at 5,000 dollars or more in a single year." Tr. 2362, 2421 Without the specific requirement of a *quid pro quo* articulated in the jury instructions, Martin's conviction cannot stand.

In the instant case, the Government cited *United States v. Holzer*, 816 F.2d 304, 308 (7th Cir. 1987), for the proposition that, if required, a *quid pro quo* may properly be inferred. The United States Supreme Court rejected such an argument in the *Sun-Diamond* case, where the government unsuccessfully contended that the jury's verdict necessarily included a finding that the gratuities were given "for or because of" an official act or acts despite the jury instructions that did not include a requirement of a *quid pro quo*. *Sun-Diamond*, 526 U.S. at 414.

Even if *Sun-Diamond* did not preclude the Government's argument in the instant case, no basis for any such inference was presented by the Government from any evidence introduced at this trial.

Additionally, *Holzer* is distinguishable as it involved a judge who solicited so-called loans from attorneys practicing before him. The attorneys who acquiesced were rewarded and a refuser punished. In the instant case, the Government admitted that Martin, Lowder and Fleming had been close friends since on or about 1985. G.Br. 5; Pet. App. A *infra* 3a. It was undisputed that they ate at each others' houses, watched television together, vacationed together, played basketball together, worked on home improvement projects together, and exchanged gifts. This

is hardly a case where a *quid pro quo* can be inferred merely from the giving of gifts. Moreover, it was undisputed that Martin never once asked for any favorable treatment from Lowder or Fleming, or from anyone else on the IDPA staff. It was also undisputed that he never asked Lowder or Fleming to keep quiet in the contract renegotiations, or to keep projects from going to open bid. 7/17/97, Tr. 300-01; 8/7/97, Tr. 317-18. To the contrary, Martin worked with IDPA staff willingly and cooperatively whenever there appeared to be any problem arising from the MSI contract.

There was no evidence of a *quid pro quo* in this case and the jury instructions permitted the jury to convict Martin without a finding that a *quid pro quo* had occurred. Without such evidence, and with proper instruction, no rational jury could have convicted Petitioner of bribery, and his conviction must be overturned.

B. Without *Quid Pro Quo* Element To Sustain Bribery Conviction There Is No Underlying Basis For Mail Fraud

Because the only violation of the law to support the § 1341 mail fraud convictions was the single § 666 bribery conviction as presented under the Government's theory of prosecution, Petitioner argues that the mail fraud convictions must also be overturned.

The Government's theory of prosecution, as presented to the jury, intrinsically linked the charges under § 1341 and § 666; thus, as the evidence presented, if one statute should fall, then so should the other. The § 1341 mail fraud statute contains two essential elements of

proof: a) a scheme to defraud and b) the use of the United States mails. Without any proof of the intent to defraud, as alleged in the single count of bribery, the § 1341 mail fraud convictions cannot stand without the *actus reus* of the essential element of the fraud.

The above illustrates, as a matter of law under Rules 403 and 404(b) of the Federal Rules of Evidence, that the jury was prejudiced in its contemplation of the mail fraud charges by the bribery charge. If the bribery conviction falls, the evidence and testimony presented at trial becomes extrinsic to the mail fraud charges. In *United States v. Hall*, 116 F.3d 1253 (8th Cir. 1997), the court held that if the exposure to extrinsic evidence influences only one juror, the verdict is as unfair as if all jurors were influenced. Thus, the mail fraud charges must also be overturned.

CONCLUSION

Petitioner respectfully submits that his offense conduct, as charged, did not and does not constitute a violation of § 666 for the reasons stated herein and that 1) absent a federal interest in the alleged offense conduct and; 2) without the jury instruction that a *quid pro quo* is required, his bribery conviction cannot stand. Moreover, without a conviction for a violation of § 666, there is no underlying basis for the mail fraud convictions under 18 U.S.C. § 1341, and they, too, must be overturned.

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

MICHAEL R. MARTIN
Petitioner
Reg. No. 10911-026
Federal Prison Camp
P.O. Box 5000
Florence, Colorado 81226

APPENDIX

A

In the
United States Court of Appeals
for the Seventh Circuit

Nos. 98-2621 and 98-2967

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL R. MARTIN and RONALD D. LOWDER,

Defendants-Appellants.

Appeals from the United States District Court
for the Central District of Illinois,
No. 96 CR 30036 – Richard Mills, *Judge*.

ARGUED SEPTEMBER 10, 1999 – DECIDED NOVEMBER 1, 1999

Before POSNER, *Chief Judge*, and EASTERBROOK and ROVNER, *Circuit Judges*.

POSNER, *Chief Judge*. Martin and Lowder were convicted by a jury of mail fraud, 18 U.S.C. § 1341, and Martin with giving a bribe in connection with a federally funded program, § 666(a)(2), and Lowder both with receiving such a bribe, § 666(a)(1)(B), and misapplying government property. § 666(a)(1)(A). Martin was sentenced to 70 months in prison and Lowder to 66 months, and each was also ordered to pay restitution to the Illinois Department of Public Aid of $12.3 million. Their

appeals raise a number of issues, only some of which have enough merit to require extended discussion. For example, the argument that an employee of the Department of Public Aid who purloined incriminating documents and gave them to the Illinois State Police was acting as an agent of the state and so violating the Fourth Amendment (made applicable to the states by the Fourteenth) raises purely factual issues as to which it is enough to say that the district court did not commit clear error in rejecting the argument. It is true that a district court's answer to the ultimate question whether a private person is actually a government agent, a question that requires the application of a legal concept (agency) to facts, may, after *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996), be subject to plenary review by the court of appeals, as we noted in *United States v. Shahid*, 117 F.3d 322, 325 (7th Cir. 1997), and assumed without discussion in *United States v. Hall*, 142 F.3d 988, 993 (7th Cir. 1998). But the determination of the underlying facts remains subject to the clear-error rule, *Ornelas v. United States, supra*, 517 U.S. at 699, 116 S.Ct. 1657, and the Fourth Amendment issue in this case pivots on such a fact: whether the state police asked the employee to obtain documentary evidence of Lowder's misconduct. The judge thought not, and we cannot say that he committed a *clear* error in so finding. *United States v. McAllister*, 18 F.3d 1412, 1417-18 (7th Cir. 1994).

The facts relevant to the principal issue presented by the appeals, viewed, as they must be, as favorably to the verdict as the record permits, are as follows. (Our summary emphasizes Lowder's conduct, as there was considerably more evidence of Martin's guilt.) The Department

of Public Aid administers the Medicaid program in Illinois, which is half funded by the federal government. Lowder worked for a bureau within the department that attempts to reduce Medicaid costs by collecting any private health insurance proceeds to which the Medicaid recipient may be entitled, in order to offset the expense to the Medicaid program. In 1985, the Department hired a contractor to assist with these collections. Martin worked for the contractor and struck up a friendship with Lowder. Five years later Martin bought out the contractor and in effect assumed its contract with the Department. At first when Martin and Lowder socialized they split the expenses, but as time went on Martin picked up a larger and larger share, even after the Department established a policy that employees should not accept gifts from the Department's contractors. In 1993 and 1994 particularly, Martin (or in some instances Ladd, an alleged coconspirator who was, however, acquitted) fairly showered Lowder with gifts in various forms, including upgrading Lowder's round-trip coach ticket to first class at a cost of more than $2,000 on a trip to Germany, giving him $1,000 to gamble with and $200 to spend at a striptease joint, and giving him almost $900 for the expenses of another trip. Lowder failed to disclose any of these gifts to the Department of Public Aid, as its regulations required him to do since the giver was a contractor with the Department. Martin deducted the gifts as business expenses on his company's income tax returns. On January 1, 1995, Martin hired Lowder away from the Department (he had been dangling the possibility of a job offer before Lowder for at least a year) but continued giving him gifts, including $6,000 for tickets and other expenses related to a trip

by Lowder and his girlfriend to the Superbowl. This gift, though received after Lowder went to work for Martin, had been promised before.

The motive for Martin's generosity toward Lowder, as well as for Martin's lavish donations to Governor Edgar's campaign fund and lavish gifts to influence-peddlers, legislators, and executive officials, was to get favorable terms for his company in its dealings with the Department of Public Aid (and also to land other profitable contracts with the state). Lowder was involved in these negotiations and he gave work to the company that the Department could have done itself at lower cost, and he persisted in this even after it was questioned by other employees of the Department. Lowder also went easy on Martin's company when it defaulted on its obligation to load certain data into the Department's computer system, and showed other favoritism to the company.

In 1993 the company successfully sought to amend its contract with the Department. In particular, it got the Department to agree to pay it $350 every time it identified an insurer of a Medicaid claimant, even if no money was ever obtained from the insurer; and, what is more, to pay it that amount for 13,000 such identifications that it had made before the contract was amended and had been compensated for under the terms of the original contract. As Lowder well knew, $350 was at least ten times what the identification was worth, and much more than the existing contract terms entitled Martin's company to. Lowder was directed to prepare a cost estimate for the amended contract. The estimate was that the amendment would cost the Department hundreds of thousands of dollars for no additional benefit, yet Lowder termed it a

more equitable payment system than the existing one even though the existing one was much more favorable to the Department and there were no "equities" in favor of the new system. He recommended that the Department adopt it; it was adopted; and in administering it Lowder at first allowed Martin's company to claim $350 for the identification of an insurer even when the "identification" consisted of an entirely trivial change in the Department's records, such as changing the first name of an insured from "Jim" to "James." Or when it was entering information that was completely worthless to the Department, such as the identification of an insurer more than two years after the medical bill had been paid that the insurance might have covered, when the insurer would not pay claims made more than two years after they accrued; or identifying an insurer that had canceled the insurance before the claim accrued. Even under the amended contract, none of these identifications should have been credited, as Lowder knew.

Furthermore, by concealing the existence of the amended contract from his staff for six months after it was adopted, Lowder prevented the staff from devising procedures that would have made it more difficult for Martin's company to get credit for worthless identifications. Lowder also failed to relay complaints from his staff about the company's performance to his superiors. Audits conducted after the government began investigating the defendants revealed thousands of invalid identifications; the amended contract had cost the Department an additional $12.9 million over the original contract

price, causing a net loss to the Department of $12.3 million after offsetting $600,000 that it owed Martin's company for legitimate services. The contract was terminated and a different contractor hired who charged a much lower rate for actual collections from insurers and charged zero for identifying insurers.

Lowder's guilt of receiving bribes is not open to serious doubt. A reasonable jury could find that he accepted the gifts and the job from Martin "intending to be influenced or rewarded in connection with any business . . . [of the Department of Public Aid] involving anything of value of $5,000 or more." 18 U.S.C. § 666(a)(1)(B). The more difficult question is whether Lauder's [sic] failure to advise against the amended contract was a form of mail fraud. Concern has long been expressed that the failure of the mail fraud statute to define "fraud" invites prosecutorial overreaching. E.g., *United States v. Dial*, 757 F.2d 163, 170 (7th Cir. 1985); *United States v. Margiotta*, 688 F.2d 108, 143 (2d Cir. 1982) (separate opinion); John C. Coffee, Jr., "The Metastatis of Mail Fraud: The Continuing Story of the 'Evolution' of a White-Collar Crime," 21 *Am. Crim. L. Rev.* 1 (1983). The concern has been exacerbated by Congress's restoration to the mail fraud statute of the "intangible rights" doctrine, 18 U.S.C. § 1346; see *United States v. Bloom*, 149 F.3d 649, 655 (7th Cir. 1998), a judicial interpretation of the original statute which the Supreme Court disapproved in *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987). The doctrine makes it a federal crime to defraud one's employer of his right to one's loyal and honest services. *United States v. Bloom, supra*, 149 F.3d at 655; *United States v. Brumley*, 116 F.3d 728, 733-34 (5th Cir. 1997) (en banc); *United States v. Sawyer*, 85 F.3d 713,

723-24 (1st Cir. 1996). The government's argument is that if Lowder had been loyal to his employer, the Department of Public Aid – if his loyalty had not been bought by Martin, his benefactor, who was trying to mulct the Department – he would have spoken out against the approval of the amended contract, which he knew would impose heavy costs on the Department with no offsetting benefits.

It is easy to see how the next step in "intangible rights" thinking would be to argue that an elected official who receives a donation to his campaign fund and afterward fails to prevent the donor from obtaining favorable treatment in dealing with the government is defrauding the government of its right to his loyalty. *Coffee, supra,* at 15-17. We are speaking not of a case in which there is either an explicit quid pro quo or even some positive act by the official to assist the donor, but merely of a case in which it can be proved (though this will often be impossible to do with the certitude required in a criminal case) that the official, had he not received the donation, would have taken positive steps to try to prevent the donor from receiving favorable treatment. For example, a legislator well known for his anti-smoking views, having received a generous donation from a cigarette company, might have muted his opposition to the industry's position. But the courts have made clear that criminal inducement of a legislator to take particular action cannot be inferred from the legislator's acceptance of campaign contributions from interests urging the action, *McCormick v. United States,* 500 U.S. 257, 272, 111 S.Ct. 1807, 114 L.Ed.2d 307 (1991); *United States v. Allen,* 10 F.3d 405, 411 (7th Cir. 1993); *United States v. Taylor,* 993 F.2d 382, 385

(4th Cir. 1993); *United States v. Biaggi*, 909 F.2d 662, 695 (2d Cir. 1990), or from his acceptance of lobbyists' hospitality. *United States v. Sawyer, supra*, 85 F.3d at 741-42; *United States v. Woodward*, 149 F.3d 46, 54-55 (1st Cir. 1998). The first set of cases involved specific federal criminal prohibitions, such as the prohibition against bribery in federally funded programs that Lowder also violated, but the second set involved the mail fraud statute and we cannot imagine that they would be decided differently if the government decided to prosecute them under the "intangible rights" doctrine. Cf. *United States v. Sun-Diamond Growers*, 526 U.S. 398, 119 S. Ct. 1402, 143 L.Ed.2d 576 (1999); Todd E. Molz, Comment, "The Mail Fraud Statute: An Argument for Repeal by Implication," 64 U. Chi. L. Rev. 983, 985-86 (1997).

The present case, however, is not one in which the government employee, having received lobbyists' hospitality, gifts, or (if an elected official) campaign contributions, afterward favors or fails to oppose his benefactor. Nor is it a "revolving door" case in which a government employee is "rewarded" for having favored a contractor or regulated firm by being hired by it. This is a case in which a properly instructed jury – the instructions are not challenged – had before it evidence from which it could infer with the requisite certitude that the government employee had been bribed (including with the implicit promise of a future job in the private sector) to engage in acts within the scope of his employment to assist the person who had bribed him to commit those acts, and as a result deprived his employer of the latter's right to the employee's honest services. E.g., *United States v. Bloom, supra*, 149 F.3d at 656-57; *United States v. Isaacs*, 493 F.2d

1124, 1149-50 (7th Cir. 1974) (per curiam); *United States v. Woodward, supra,* 149 F.3d at 54-55.

Besides not questioning the instructions to the jury, Lowder does not challenge either the prosecutor's references in closing argument or elsewhere to the "intangible rights" doctrine or – this is particularly critical – the scope of the doctrine, except to join Martin's cursory argument (if argument it be) that the fiduciary duty the breach of which is charged as mail fraud must have its source in state law, as held in *United States v. Brumley, supra,* 116 F.3d at 734-35. The fear that motivated the *Brumley* decision is that if federal courts are free to devise fiduciary duties the breach of which violates the mail fraud statute, the result will be the creation in effect of a class of federal common law crimes, see *United States v. Bloom, supra,* 149 F.3d at 656, something federal courts have steadily refused to do. *Liparota v. United States,* 471 U.S. 419, 424, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985). *Brumley,* however, is contrary to the law in this circuit, e.g., *United States v. Keane,* 522 F.2d 534, 544-45 (7th Cir. 1975); *United States v. Bush,* 522 F.2d 641, 646 n. 6 (7th Cir. 1975), and in the other circuits to have addressed the question. *United States v. Sawyer, supra,* 85 F.3d at 726; *United States v. Frost,* 125 F.3d 346, 366 (6th Cir. 1997); *United States v. Margiotta, supra,* 688 F.2d at 124; *United States v. States,* 488 F.2d 761, 767 (8th Cir. 1973); cf. *Parr v. United States,* 363 U.S. 370, 389, 80 S.Ct. 1171, 4 L.Ed.2d 1277 (1960).

The question is one of statutory intent. Is the mail fraud statute intended merely to back up state criminal law by denying criminals the use of a federal instrumentality (the postal service) to assist them in committing crimes? Or is it aimed at any fraud that is accomplished through the use of the postal service? The cases we have

cited assume that the answer is the latter. Many cases say that the statute reaches "everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future. . . . It was with the purpose of protecting the public against all such intentional efforts to despoil, and to prevent the post office from being used to carry them into effect, that this statute was passed." *Durland v. United States*, 161 U.S. 306, 313-14, 16 S.Ct. 508, 40 L.Ed. 709 (1896); see also *United States v. Lindsey*, 736 F.2d 433, 436 (7th Cir. 1984); *United States v. Kreimer*, 609 F.2d 126, 128 (5th Cir. 1980); *United States v. States, supra*, 488 F.2d at 767. "The mails are a mere jurisdictional hook which permits the prosecution of fraudulent schemes." Ellen S. Podgor, "Criminal Fraud," 48 *Am. U. L. Rev.* 729, 753 (1999). It can be argued that tying the concept of fraud in the mail fraud statute to state law and to federal statutes expressly creating fiduciary duties would allay the persistent concerns about the breadth and vagueness of the statute. Against this it can be argued that a uniform albeit judge-made federal concept of fiduciary duty might do the trick as well or better – but the riposte is that a century of interpretation of the statute has failed to still the doubts of those who think it dangerously vague. The textual arguments deployed in *Sun Diamond Growers* to cabin the gratuity statute may point the way to a narrowing interpretation of the mail fraud statute – or may not, for it can be argued that the considerations deployed in that opinion are not available in interpreting the mail fraud statute, with its sparse text.

We need not pursue this difficult issue further. A litigant who wants us to overrule our previous decisions must do more than cite a recent decision of another court

(unless the Supreme Court!) that is to the contrary. In a section of his brief that Lowder joined, Martin cited *Brumley* and in fact quoted the passage in which the Fifth Circuit concluded that the fiduciary duty the breach of which gives rise to federal mail fraud must be grounded in state law. But that is *all* that Martin did – cite the case and quote its conclusion. He did not cite any of the contrary cases or make any argument for why they should be overruled and *Brumley* followed. This waived the point, *JTC Petroleum Co. v. Piasa Motor Fuels, Inc.*, 190 F.3d 775, 780-781 (7th Cir. 1999), and so we shall adhere to our anti-*Brumley* position for now, but without prejudice to reexamining it without preconceptions should a full argument against it be mounted in a future case.

Lowder argues that his failure to speak out against the contract was due not to the gifts he had received from Martin but either to his honest judgment or, more plausibly, to the fact that "the fix was in." That is, through his extensive courting of higher officials, Martin had obtained passionate support for the amended contract from Lowder's superiors, and so any protest against it would have been futile and might have endangered his job. This is possible but ignores the evidence that Lowder performed such acts (not omissions) on Martin's behalf as arguing to his superiors for the $350 fee per insurer identification that Martin's company sought, plus the even more damning evidence of Lowder's failure to disclose to his superiors the conflict of interest that he had by virtue of receiving expensive gifts from Martin.

The "fix" becomes significant when we turn to the sentence, where the only significant issue is the order of

restitution. The $12.3 million loss that the amended contract was found to have caused the Department of Public Aid was a loss intended by Martin and Lowder within the meaning of the sentencing guidelines and was therefore the appropriate amount for the judge to consider in deciding what prison sentence and fine to impose on each of them. U.S.S.G. §§ 2B1.1, Application Note 2; 2C1.7, Application Note 3; 2F1.1, Application Note 8. Actually, the guidelines do not distinguish between a loss that is intended but not actual in the sense that the scheme did not succeed, and an intended loss that though actual would have occurred regardless of the scheme. But since the guidelines treat both the intended and the actual loss the same, it does not matter in which cubbyhole we place such a loss. For completeness we note that a loss that is neither intended nor caused by the fraudulent scheme – an unintended loss not caused by the defendants' wrongdoing (either the wrongdoing for which they are convicted, or relevant conduct within the meaning of the guidelines) – is not relevant to the determination of the severity of the sentences.

When it comes to restitution under the Mandatory Victims Restitution Act of 1996, 18 U.S.C. § 3663A, however, the existence of a causal relation between the defendant's conduct and the loss that the Act requires him to restore is essential, as assumed in *United States v. Menza*, 137 F.3d 533, 537-39 (7th Cir. 1998), and *United States v. Rice*, 38 F.3d 1536, 1540 (9th Cir. 1994); cf. *Hughey v. United States*, 495 U.S. 411, 420, 110 S.Ct. 1979, 109 L.Ed.2d 408 (1990). Not only does the Act itself confine the right of restitution to "victims" who are "directly harmed" by the defendant's conduct, § 3663A(a)(2); as we have emphasized

in upholding the constitutionality of retroactive application of the Act, most recently in *United States v. Szarwark*, 168 F.3d 993, 998 (7th Cir. 1999), the Act seeks to engraft a civil remedy onto a criminal statute, giving the victim of the crime the recovery to which he would have been entitled in a civil suit against the criminal and thus merely providing a procedural shortcut rather than imposing a heavier criminal punishment. See also *United States v. Newman*, 144 F.3d 531, 537-42 (7th Cir. 1998); *United States v. Nichols*, 169 F.3d 1255, 1279-80 (10th Cir. 1999). This interpretation requires that restitution under the Act be limited to situations in which it could have been obtained in a civil suit. Civil restitution does not require proof of any loss at all, and hence that the defendant caused the loss, when, as is common, the plaintiff is seeking to recover the defendant's gain rather than the plaintiff's loss from the unlawful conduct complained of. But obviously if the plaintiff is seeking to recover his loss from the defendant, he has to prove that the defendant caused the loss. Thus, had the Department of Public Aid brought a civil suit against the defendants to recover the loss which their misconduct caused it, it would have had to show that the loss would not have occurred but for their misconduct. It could not have shown this, certainly with respect to Lowder, because even if Lowder had committed no crimes and spoken out boldly against the amended contract, it almost certainly would have been adopted because of the support for it by Lowder's superiors reaching far up into the legislature and governor's office.

Lowder's lack of causal responsibility is not critical, however. The liability of coconspirators is joint as well as several, *United States v. Pandiello*, 184 F.3d 682, 687 (7th

Cir. 1999); *United States v. Nichols*, 169 F.3d 1255, 1278 (10th Cir. 1999); *United States v. Ismoila*, 100 F.3d 380, 398-99 (5th Cir. 1996), consistent with the general common law rule making joint tortfeasors jointly as well as severally liable for the harm caused by the tort. *Woods v. Cole*, 181 Ill.2d 512, 230 Ill.Dec. 204, 693 N.E.2d 333, 337 (Ill. 1998); *In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1257 (7th Cir. 1980); *Aetna Casualty Surety Co. v. P & B Autobody*, 43 F.3d 1546, 1564-65 (1st Cir. 1994). It is true that Lowder wasn't charged with conspiracy and that under the federal criminal law of restitution as it existed before the enactment of the Mandatory Victims Restitution Act of 1996 this omission might have been fatal to any effort to impose joint liability on him. See *Hughey v. United States*, 495 U.S. 411, 110 S.Ct. 1979, 109 L.Ed.2d 408 (1990). But the Act authorizes restitution for all harm caused by "the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern," provided the defendant is convicted of an offense that has at least one of those features. 18 U.S.C. § 3663A(a)(2). *Nichols*, construing identical language added to the previous federal criminal restitution statute, 18 U.S.C. § 3663(a)(1), imposes joint liability on all participants in the scheme, conspiracy, or pattern. 169 F.3d at 1278. The offense of mail fraud requires proof of a scheme, and the indictment charged Lowder and his codefendants (including of course Martin) with scheming to defraud the state. Lowder's conviction therefore exposed him to joint liability with Martin, and in determining the scope and consequence of the scheme the judge was not limited to the evidence presented at the trial. 18 U.S.C. §§ 3664(d)(4), (d)(6), (e); *United States v. Savage*, 891 F.2d 145, 151 (7th Cir. 1989); *United States v. Obasohan*, 73 F.3d 309 (11th Cir.

1996) (per curiam). The judge expressly found that Lowder had "assisted MSI [Martin's company to] commit fraud in order to obtain an amendment to a contract which MSI otherwise would not have obtained," and it was the amendment that was the source of the $12.3 million loss. While objecting to the district judge's finding that Martin's misconduct caused the $12.3 million loss, Lowder does not deny joint liability for whatever loss the record shows.

It thus becomes critical to determine whether the judge's finding that Martin caused that loss can be sustained. This is where the "fix" bites. Unless Martin's illegal acts pursuant to the scheme to defraud were a causal factor in the award of the amended contract (which was, remember, the immediate cause of the $12.3 million loss), neither he nor Lowder can be ordered to make restitution of the entire loss. On this point we are constrained to find that the district court committed a clear error, necessitating a remand for a redetermination of the amount of restitution. Although Martin's efforts to obtain the amended contract went far beyond what he was able to achieve by bringing Lowder over to his side, most of them, such as the making of large campaign contributions, were legal (though sometimes ethically questionable), and so cannot support a finding that the illegal scheme caused the amended contract and resulting $12.3 million loss. A reassessment of the amount (if any) of the loss that is reasonably attributable to the illegal scheme will therefore be necessary on remand.

One loose end remains to be tied up. Before argument we noticed that the defendants' briefs were highly

duplicative. Issues common to both were briefed separately, sometimes in identical language, sometimes in close paraphrase. When multiple appellants raise common-issues, they should file a single consolidated brief; if any appellant wishes to raise an additional issue, or to disassociate himself from an issue raised in the consolidated brief, he should file a supplemental brief. In this case, the lead brief was filed by Martin's lawyer; and Lowder's lawyer, rather than indicating in a supplemental brief any divergent position, filed a brief largely duplicating that of Martin. When we issued an order to show cause why Lowder's brief should not be rejected, his lawyer revised and resubmitted a proper brief.

We require parties to appeals before this court to avoid needless duplication that burdens the court and disserves the client. *United States v. Torres*, 170 F.3d 749 (7th Cir. 1999) (per curiam); *United States v. Ashman*, 964 F.2d 596 (7th Cir. 1992) (per curiam); cf. 7th Cir. R. 33. We do not think formal disciplinary action required in the circumstances, but we take this opportunity to remind the bar of its duty to avoid needless duplication in the briefing of multiple-party appeals.

The judgments are affirmed except with respect to restitution, as to which the case is remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART,
VACATED AND REMANDED IN PART.

A TRUE COPY:
TESTE:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX

B

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: November 1, 1999

BEFORE: Honorable RICHARD A. POSNER, Chief Judge

Honorable FRANK H. EASTERBROOK, Circuit Judge

Honorable ILANA DIAMOND ROVNER, Circuit Judge

Nos. 98-2621 & 98-2967

UNITED STATES OF AMERICA,

Plaintiff – Appellee

v.

MICHAEL R. MARTIN and RONALD D. LOWDER,

Defendants – Appellants

Appeals from the United States District Court for the Central District of Illinois, Springfield Division
No. 96 CR 30036, Richard Mills, Judge

The judgments of the District Court are AFFIRMED except with respect to restitution, as to which the case is REMANDED for further proceedings consistent with this opinion. The above is in accordance with the decision of this court entered on this date.

(1061-110393)

A True Copy:
Teste:

/s/ Gino J. Agnello
Clerk of the United States
Court of Appeals for the
Seventh Circuit

APPENDIX

C

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

December 10, 1999

Before

Hon. Richard A. Posner, Chief Judge

Hon. Frank H. Easterbrook, Circuit Judge

Hon. Ilana Diamond Rovner, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* **Nos. 98-2621 & 98-2967 v. MICHAEL R. MARTIN and RONALD D. LOWDER, Defendants-Appellants.**	**Appeals from the United States District Court for the Central District of Illinois. No. 96 CR 30036 Richard Mills, *Judge*.**

ORDER

On November 15, 1999, defendant-appellant Michael R. Martin filed a petition for rehearing and petition for rehearing *en banc*. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*. The petition is therefore **DENIED**.